NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 2, 2022*
Decided December 6, 2022

By the Court:

No. 21-3205

PETER GAKUBA,
Plaintiff-Appellant,

v.

LARRY HENDERSON, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois.

No. 19-cv-01273-SPM

Stephen P. McGlynn,
Judge.

O R D E R

Peter Gakuba, formerly an Illinois prisoner, appeals the summary judgment on his First and Eighth Amendment claims for failure to exhaust administrative remedies. We affirm.

This suit concerns Gakuba's claims that officials at Vienna Correctional Center in Johnson County, Illinois, knew of his seafood allergy but refused to give him a non-seafood diet. In his initial complaint, Gakuba alleged that Larry Henderson, the prison's dietary supervisor, was deliberately indifferent to his need for a non-seafood diet, in violation of his Eighth Amendment rights. Gakuba amended his complaint several

* This appeal is successive to case no. 20-1473. We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

weeks later to add additional defendants who, he says, disregarded and overturned a dietary order specifying that he was allergic to seafood. He also asserted that the officials' continued provision of seafood to him amounted to cruel and unusual punishment because he had to miss meals and became malnourished. Finally, he added a claim that Henderson retaliated against him for filing this lawsuit, in violation of his First Amendment rights.

Gakuba initially sought a preliminary injunction to prevent the defendants from serving him seafood. The district court denied relief on grounds that it was unclear whether he had a seafood allergy (and if he did, whether such a condition was objectively serious), and he had not shown that he would suffer irreparable harm without the injunction. We dismissed his appeal as moot because he already had been released from prison and the threat he sought to enjoin no longer existed. *See Gakuba v. Henderson*, No. 20-1473, 2021 WL 5505315 (7th Cir. Nov. 24, 2021).

Meanwhile, the defendants moved for summary judgment on Gakuba's First and Eighth Amendment claims based on Gakuba's failure to exhaust his administrative remedies before filing this suit. *See* 42 U.S.C. § 1997e(a). The district court granted the motion, explaining that the record included copies of grievances the administrative review board received from Gakuba between 2016 and 2020, as well as additional grievances he had filed but had not been ruled upon at the time he filed his amended complaint. The court found two grievances "relevant to this case"—one dated September 9, 2019, and one dated October 22, 2019—but these did not satisfy the exhaustion requirement, partly because Gakuba brought this suit before the board had ruled on his grievances, and partly because the grievances did not sufficiently address the defendants' alleged conduct regarding his request to receive non-seafood meals. The court also rejected Gakuba's argument that his claim of starvation was a non-grievable offense. Under the Prison Litigation and Reform Act, the court emphasized, there are no exceptions to the exhaustion requirement, even for "special circumstances." See District Court's order of July 26, 2021, at 10 (quoting *Ross v. Blake*, 578 U.S. 632, 639 (2016)).

Gakuba then moved to alter or amend the judgment, *see* FED. R. CIV. P. 59(e), clarifying that he was arguing that the alleged starvation rendered his administrative remedies "unavailable." The court denied the motion. The court determined that Gakuba did not establish a manifest error of law or fact and, moreover, the record did not support his contention that he was "dying" or physically unable at the time to file

grievances (indeed, he had filed numerous other grievances at Vienna in the second half of 2019).

On appeal, Gakuba does not appear to dispute the district court's finding that he did not exhaust his administrative remedies, and instead, challenges only the court's determination regarding the availability of such remedies while the defendants "intentionally sought to starve him to death." As proof of the urgency of the situation, he says that the defendants' deliberate indifference to his seafood restrictions caused him to lose 20 pounds during his 19 months at Vienna.

We agree with the district court that nothing in the record reflects that administrative remedies were unavailable to Gakuba during his time at Vienna. The court understood Gakuba to argue that administrative remedies were unavailable because he was physically incapable of taking necessary steps to comply with the grievance process. A remedy is unavailable if the prisoner is "physically unable to pursue it," *see Hurst v. Hantke*, 634 F.3d 409, 412 (7th Cir. 2011), but Gakuba showed through his repeated filing of grievances at this time that he was physically able to pursue administrative remedies. And even if Gakuba meant to argue that he was exempted from exhausting administrative remedies because his condition put him in imminent danger, this argument fails. In *Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1173–74 (7th Cir. 2010), we suggested that administrative remedies are unavailable when they cannot redress immediate danger to prisoner health or safety, but Gakuba's allegations do not reflect that he was in such imminent danger to prevent him from seeking an administrative remedy in the prescribed time and form.

Finally, Gakuba contends that, at a minimum, the court should have conducted a *Pavey* hearing, presumably because he thought there were factual issues in dispute. *See Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008). But even if we take all his assertions as true, a *Pavey* hearing is not required because he has not shown that the grievance process was unavailable to him.

We have considered Gakuba's other arguments; none merit discussion.

AFFIRMED